that this was done. Well then, was this a fault or neglect of the master or crew "in the navigation of the ship?" I think it was. Neglect or default in navigation is the same thing as improper navigation, and that has been well and correctly described as including "every case where something is omitted to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried"—*per* Fry, L.-J., in *Carmichael*, L.R., 19 Q.B.D. 249; see also *Good*, L.R., 6 C.P. 563. Navigation means more than the transit of the ship across the sea. It includes the management of the ship with a view to her crossing the sea—there may be navigation "without any voyage at all"—*Carmichael, supra* (p. 248). There remains, however, another question, was this fault or neglect on the part of the master or crew in the navigation of the ship, committed "in the ordinary course of the voyage." If the voyage here referred to had been the charter-party voyage, there could have been no doubt, on the authorities, that any fault or neglect committed while the ship was in port at Chittagong, was committed in the course of the voyage. But the charter-party is not set out in the record as part of the contract of affreightment with which the pursuers have any concern. It is only mentioned incidentally by the Sheriff-Substitute, and the defenders' counsel stated at the bar that they could not plead the charter-party against the pursuers. The voyage therefore with which we have alone to do is the voyage from Chittagong to Dundee. Was the fault, then, which led to the damage, committed in the course of that voyage? Here again my answer must be affirmative. The fault itself, as we have seen, was the failure duly to case the pipe. It was a fault no doubt to omit the casing of the pipe while the ship lay at Chittagong before the cargo was loaded. But that fault or neglect was committed every day so long as the neglect continued. It was therefore committed every day on the voyage from the time the ship left Chittagong until the damage occurred. The fault or neglect could have been remedied between the 5th of December, when the vessel sailed, and the 11th of December when she encountered the gale in the course of which the damage was done—not easily remedied perhaps but certainly possible. It could have been remedied by the partial removal of the cargo so as to admit of a casing being put on; or the discharge-hole could have been plugged up (as was done during the gale) to prevent damage by the entrance there of sea-water in the event of the pipe being broken in consequence of the want of casing. The neglect or default in question was a continuing one, and although committed in part was not the less committed after the voyage to Dundee began.

I am therefore of opinion that the damage in question was occasioned by the neglect or default of the master or crew in the navigation of the ship in the ordinary course of her voyage, and that for the consequences of such neglect or default the defenders are exempted by the express condition of the bill of lading under which the cargo was carried.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Find in fact (1) that the defenders were carriers in their ship the 'Tilkhurst' of a cargo of jute from Chittagong to Dundee under the bill of lading No. 20 A of process, of which bill of lading the pursuers are the onerous endorsees; (2) that the said cargo was damaged in the course of said voyage by sea-water, which obtained access to said cargo by means of a hole in the side of the ship to which was attached or connected the discharge-pipe of the forward water-closet on the port side, which pipe was broken in the course of the voyage; (3) that said pipe was broken by pressure of the cargo thereon; (4) that said pipe was not cased as it should have been to prevent the pressure of cargo on said pipe, and that the want of casing as aforesaid led to the breaking of said pipe and consequent damage of the cargo; (5) that the failure to case said pipe was a default or neglect on the part of the master or crew of said ship in the navigation of the ship committed by them in the ordinary course of said voyage: And find in law that the defenders are not liable for said damage, it being damage for which they are exempted from liability by the terms of said bill of lading: Therefore assoilzie the defenders from the conclusions of the action: Find no expenses due to or by either party, and decern."

Counsel for Pursuers and Respondents—Asher, Q.C.—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defenders and Appellants—D.-F. Balfour, Q.C.—Aitken. Agents—Forrester & Davidson, W.S.

Saturday, February 28.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

TAIT *v.* JOHNSTON.

Sheriff Court—Union of Counties into One Sheriffdom—Act 33 and 34 Vict. c. 86, sec. 12—Jurisdiction—Citation.

Held that where two or more counties are united into one sheriffdom, a person is bound to answer a citation to the principal court of the united counties although resident in another of the counties.

Citation—Postal Citation—Act 45 and 46 Vict. c. 77—Execution of Citation.

A citation by registered letter, which bore *in gremio* to be executed by one law-agent, was signed by another law-agent for him. The execution of citation was in statutory form. *Held* that the citation could not be challenged until the execution was reduced.

Opinion (*per* Lord Rutherfurd Clark) that the citation was in itself valid.

The Act 33 and 34 Vict. c. 86, provides by section 12 that every union of counties into one sheriffdom "shall be deemed to be a complete union to all intents and purposes, in so far as regards the jurisdiction, powers, and duties of the sheriff and his substitutes, and in so far as regards the powers, duties, rights, and privileges of procurators before the courts of the sheriff. And the several counties of any such united sheriffdom shall not be thereafter regarded as separate sheriffdoms or jurisdictions in so far as regards the powers, duties, rights, and privileges of the sheriffs and his substitutes and the procurators of the Sheriff Court."

Upon 7th August 1890 John Johnston, joiner, Innerleithen, raised an action in the Sheriff Court of the sheriffdom of the Lothians and Peebles at Edinburgh, against George Tait, Woodside Cottage, Innerleithen, concluding for payment of £50, 17s. 3d., being the balance of the contract price of a dwelling-house erected by him for the pursuer. Warrant was granted in ordinary form to cite the defender, who was ordained, if he intended to defend the action, to lodge a notice of appearance in the hands of the Clerk of Court at Edinburgh within the period of *induciæ*. A copy of the petition, with warrant annexed, was duly served upon the defender by registered letter, in terms of the Act 45 and 46 Vict. c. 77. The said Act prescribes no statutory form of citation. Here the citation bore *in gremio* to be executed by Marcus John Brown, S.S.C. and law-agent, but was subscribed "For Marcus J. Brown, S.S.C., T. H. Lang Guthrie, Solicitor, 2 George Street." The execution of citation was returned by the said Marcus John Brown in the form given in the schedule annexed to said Act. The defender having paid no attention to the citation afterwards tendered the whole sum sued for, but refused to pay any of the expenses of the action. This offer the pursuer refused, and upon 12th September 1890 obtained a decree in absence before the Sheriff-Substitute at Edinburgh with expenses of process. Having extracted said decree, and obtained a warrant thereon, the pursuer on 6th October 1890 charged the defender to pay within six days the said sum of £50, 17s. 3d., with interest, £3, 9s. 2d. of expenses of process, and 3s. as the dues of extracting said decree.

The defender thereupon brought a note of suspension against the said John Johnston to have the decree, warrant thereon, and charge suspended, and the respondent interdicted from proceeding with any diligence, in which he pleaded, *inter alia*—"(1) The complainer having no residence or place of business within the county of Mid-Lothian, is not subject to the jurisdiction of the Sheriff of the Lothians and Peebles or his Substitutes sitting at Edinburgh as Judges of the Sheriff Court of the county of Mid-Lothian; and *separatim*, in the circumstances stated, a citation to the Sheriff Court at Edinburgh was not a citation which the complainer was bound to obey. (2) The proceedings complained of being incompetent and inept in respect of no jurisdiction over the complainer, suspension and interdict should be granted as craved, with expenses. (3) *Separatim*—The complainer never having been cited to the said Sheriff Court at Edinburgh, the decree pronounced against him is inept, and the same with all that has followed thereon should be suspended as craved."

The respondent pleaded, *inter alia*—"(2) The decree and proceedings following thereon being regular and formal, are not liable to be set aside under suspension."

The complainer thereafter consigned in the hands of the Clerk to the Bill Chamber all the moneys which he had been decerned to pay, less the interest.

Upon 7th February 1891 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Having considered the cause, with the amended plea for the complainer, Repels the first, second, and third pleas-in-law for the complainer: Repels the reasons of suspension, and decerns: Finds the respondent entitled to expenses, &c.

"*Opinion.*—This is a note of suspension of a decree in absence pronounced in the Sheriff Court at Edinburgh against the complainer, who is admittedly resident and domiciled in the county of Peebles. I do not know whether the case is of much importance to the parties, but the pleas of the complainer raise questions of practice of importance and general application. Three grounds of suspension were stated, and the note was not supported in argument on any other ground. It was maintained that the decree should be suspended and the diligence thereon interdicted—(1) because the citation was defective in form; (2) because the Sheriff sitting in the Sheriff Court at Edinburgh had not jurisdiction over a defender resident and domiciled in the county of Peebles; and (3) because the complainer was not liable to be cited to the Sheriff Court at Edinburgh, and was not bound to obey the citation.

"1. The objection to the citation was this—That while the schedule of citation left with the defender bears to be executed by Marcus John Brown, S.S.C., Edinburgh, law-agent, it is not signed by him, but bears to be signed for him by T. H. Lang Guthrie, solicitor. It was not denied that both of these gentlemen are enrolled law-agents, but it was maintained that the signature of Mr Brown was essential. That is the only defect in point of form averred.

"Service of a summons by a law-agent is authorised by the recent Statute 45 and

46 Vict. cap. 77. Section 3 of that Act provides, *inter alia*, that a summons may be executed by an enrolled law-agent by sending to the residence of the person on whom it is to be served, in a registered letter by post, 'the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, . . . and that such posting shall constitute a legal and valid citation,' unless such person shall prove that the letter was not left or tendered at his residence.

"The 4th section of the Act provides that 'the execution returned by a law-agent shall for all purposes be equivalent to an execution by an officer of court,' and that it may be in the form of a statutory schedule.

"There is annexed to the petition in this case an execution signed by Mr Marcus J. Brown, which is in terms of the statutory schedule.

"The statute does not expressly require that the law-agent who serves the summons shall sign the schedule of citation. But it was maintained that this is required by the Statute 1592, cap. 141, which requires that 'all copies of summounds and letters quhilkes sall be delivered to ony party be subscrived by the officer executor thereof."

"It would appear that the documents to which this Act refers are the schedules of citation, and not the principal writs themselves—*Izatt* v. *Robertson*, January 25, 1840, 2 D. 476, and *Bruce* v. *Hall* there referred to. But I am under the apprehension that before 1882 (except in the cases to which the Act 34 and 35 Vict. cap. 42, applies) the formalities of citation on summonses in the Sheriff Court were not regulated by that Act, but by the Act 1 and 2 Vict. cap. 119, sec. 23, and the relative Act of Sederunt, 10th July 1839, sec. 13. There is no statutory form of a schedule of citation, and its signature by the officer is not required expressly by either of these enactments, although perhaps such a requirement may be implied in the section of the statute, while the presence of a witness at the execution and the signature of the officer on each page of the summons is expressly required by the Act of Sederunt.

"That requirement is not repeated in the Citation Amendment (Scotland) Act 1882, and of course there is no room for a witness in the case of service by registered letter, and I am not at present prepared to hold that the signature of the law agent, who is said in the schedule to make the service, is a statutory requirement. If it be, I should think it a very loose and dangerous practice to send a schedule signed by one law agent for another, and should have great difficulty in holding that the schedule of citation in this case was signed by Mr Brown.

"But I think it is not necessary to decide that point absolutely, because no objection has been taken to the agent's execution, which by the Citation Act is equivalent to an officer's execution, and it appears to be still in accordance with our practice to refuse to entertain an objection to the schedule of citation when the execution is in form and unreduced.—*Calder* v. *Calder*, December 20, 1825, 4 S. 331; *Ramsay* v. *Pettigrew*, December 13, 1828, 7 S. 193; *Macqueen* v. *Clyne's Trustees*, May 20, 1834, 12 S.D. 610. I think, therefore, that this ground of suspension cannot be sustained.

"2. The complainer by his first plea, as originally drawn, and by his second plea objects to the jurisdiction of the Sheriff when sitting as Judge of the Sheriff Court of the county of Midlothian.

"I am of opinion that the plea of no jurisdiction cannot be sustained. The question depends on the provisions of the statutes by which certain counties have been united into one sheriffdom. One or two of the counties in Scotland have been united as one sheriffdom for a long time back, but there have been only two statutes recently passed on the subject. The first is the Act 16 and 17 Vict. cap. 92, passed in 1853, by which the union of various counties is provided for when vacancies should occur, and section 4 provides that when a vacancy should occur in the sheriffdom of Peebles it should be united with the county of Midlothian into one sheriffdom. The later Act, which is the Act directly applicable, is 33 and 34 Vict. cap. 86, passed in 1870. By sections 4, 5, and 6, provision is made for the union of the counties of Midlothian, Linlithgow, Haddington, and Peebles into one sheriffdom, to be called the Sheriffdom of the Lothians and Peebles, and by section 12 it is enacted—[*section quoted above*].

"In the face of these absolute and comprehensive words it seems impossible to deny the jurisdiction of the Sheriff of the Lothians and Peebles in this case. Counsel for the complainer referred to section 6 of the Act 39 and 40 Vict. cap. 70 (1876), which provides that a person having a place of business in a county shall be subject to the jurisdiction of the Sheriff thereof, although domiciled in another county, if cited personally or at his dwelling-place, with power to the Sheriff to remit such action 'to the court of the defender's domicile in another sheriffdom; and to section 12, which by its first sub-section provides for citation in such cases.

"The argument, as I understand it, was that because the word county was used and not sheriffdom, it was to be inferred that but for the Act the Sheriff in one county forming part of a united sheriffdom would not have had jurisdiction over a defender who had a place of business in another county forming part of the same sheriffdom. But I think the inference inadmissible. The statute does not profess to do more than confer jurisdiction. It says nothing about the seat of the Court at which the jurisdiction is to be exercised. It confers jurisdiction in language which is not a whit more clear or absolute than that of section 12 of the Act of 1870. I do not think it applies to the jurisdiction of a Sheriff over the divisions of a united county at all. If it does, it adds nothing in language or in substance to his power, and I

think that the use of the word 'sheriffdom' at the close of the section shows that there was no intention of drawing any distinction between a county and a sheriffdom.

"Reference was made to *Edwards* v. *The Inverness and Aberdeen Railway Company*, April 24, 1862, 4 Irv. 185, where the Sheriff, sitting in the Small-Debt Court at Banff, dismissed an action of damages against the Railway Company on the ground of no jurisdiction. The statutory domicile of the Railway Company was Inverness, but it had been cited at Keith in Banffshire. The pursuer appealed to the Circuit Court at Inverness, and seems to have argued that there was no jurisdiction, because Keith was a principal station. The appeal was dismissed. The grounds of judgment do not appear quite clearly. But it was pointed out that Lords Neaves and Ardmillan both indicated that there might have been a difference had the action been brought in the Sheriff Court at Elgin, in which county the injury happened, and it was argued that as Elgin and Banff were united counties it could, if the respondent's argument were sound, have made no difference as to the question of jurisdiction whether the action was brought at Banff or at Elgin. It does not appear, however, that the attention of the Judges was called to the point at all, and they do not purport to decide it, nor indeed allude to it.

"3. The further question is this—Whether, admitting the jurisdiction of the Sheriff, it was competent to convene the defender to the Sheriff Court at Edinburgh, and entertain a cause against him in that Court; or whether the complainer is now entitled to say that he was only bound to attend the Court of the Sheriff at Peebles, the head burgh of the county in which he was resident.

"This is not a question of jurisdiction exactly, but rather about the conditions of its exercise, and especially about the Court at which it can be competently exercised. It is not in this case complicated by any question as to the power of the Sheriff-Clerk to sign the warrant of citation, because the warrant is signed by the Sheriff-Substitute about whose power there is no question. The point appears a difficult one, and there is, so far as I have been able to discover, hardly any authority in our books on the subject. The only similar reported case, so far as I am aware, is *Dowie* v. *Douglas*, May 30, 1817, F.C., which it may be worth while merely to refer to, but as I do not see that it can be used as an authority either way it is not necessary to advert to it further. I may refer also to Ersk. i. 4, 5, where he treats of the exercise of a Sheriff's jurisdiction at the head burgh of a county, or of the division of a county, and he gives as an example and illustration 'the shire of Clydesdale,' which in his time had been separated into three divisions, but he does not affirm that it would be incompetent to exercise jurisdiction at the head burgh of one division over an inhabitant of another division.

"Allusion may also be made to the Statutes 4 Geo. IV. c. 97, in 1823, which by section 6 provides that where two counties are under the jurisdiction of one Sheriff they shall constitute one commissariot; and to 1 and 2 Vict. cap. 26, which authorises the Sheriff of two counties to hold commissary courts in both counties if he shall think proper. The inference is legitimate that he could if he chose exercise his jurisdiction, at least as commissary, in one of the counties over persons resident in another, and that seems simply in consequence of two commissariots being united.

"It is argued, on the one hand, that before the union of the counties it was the right of the defender to be convened at the Sheriff Court in his own county, and that there are no words in the statute to deprive him of that right; that the object of establishing resident Sheriff-Substitutes and local courts was just to make this right effectual; and that although there might be no great hardship in this case, still there was some hardship, and the hardship would be very great if in some of the northern counties it were held to be in the power of a pursuer to compel a defender to come from one county to another in the same sheriffdom.

"On the other hand, it was maintained that seeing the complainer resided within the territory of the Sheriff, he was bound to obey his citation judicially given, and that there was neither principle nor authority for denying to the Sheriff the power to convene any person within his territory to any established seat of his court; that it was within the power of a Sheriff, by an order of court, to determine to what seat of court persons resident in the different districts of his sheriffdom should be convened; that this was a matter safely left to his discretion and not vested in any other authority, and that the power of the Sheriff had been exercised in various cases in which more than one seat of the court had been established in a county; that the intention of the statute was to abolish all distinctions between the different counties united into one sheriffdom so far as the administration of the law was concerned.

"Having regard to the very comprehensive language of the statute uniting the counties, I am unable to sustain the complainer's contention, or to restrict the Sheriff in the exercise of his jurisdiction, without some definite authority, statutory, judicial, or institutional. It is true that it would be highly inconvenient if a pursuer were allowed to call a defender to the court in a united sheriffdom most convenient to himself without regard to the residence of the defender, but it is not necessary to hold that a pursuer has that power. The matter is under the control of the Sheriff, who can regulate it by an order of court, and can, if he thinks fit, refuse to issue his warrant of citation against a defender more suitably amenable to another court, or can perhaps deal with any question of the kind by an award of expenses. If he have such power, the alleged inconvenience may prove more theoretical than actual. In this case the Sheriff-Substitute has himself granted warrant to cite the defender to lodge his defences with the Sheriff-Clerk at Edinburgh,

and has decerned against him because he did not appear, and I have not been able to discover any reason which appears to me sufficient for denying his right to exercise his undoubted jurisdiction and power in that manner."

The complainer reclaimed, and argued—(1) He did not challenge the jurisdiction of the Sheriff. That was not the question. What he maintained was that he was not bound to answer a citation except to the head burgh of his own county—Ersk. i. 4, 5. To hold otherwise might lead to great hardship, *e.g.*, one Shetlander might cite another Shetlander to appear at Wick as being in the same sheriffdom. (2) The citation was bad, inasmuch as it was not signed by the agent who was said in the schedule to make the service. It was no better than an ordinary letter. When so plainly invalid it vitiated the service although the execution had not been reduced.

The respondent was not called upon.

At advising—

LORD JUSTICE-CLERK—When a statute enacts that certain counties named are to be united into one sheriffdom, and are not thereafter to be regarded as separate sheriffdoms or jurisdictions, it is perfectly clear on the face of it that the Sheriff at the head burgh of the principal of the counties united cannot be barred from citing anyone in any of these counties however much they may be inconvenienced thereby. At the same time, no one can doubt that the Sheriff, upon a representation being made to him that it would seriously inconvenience the defender to defend the action in the place to which he has been cited, would consider that objection and dispose of it. It is not to be presumed that the Sheriff exercises his powers in an unreasonable manner. If all the business of Edinburgh were attempted to be removed to Peebles or Linlithgow, some means would speedily be found for putting an end to such an outrage of public decency. The public trusts the Sheriff to conduct the business of his courts properly.

Here the defender never asked the Sheriff to remit the whole case to Peebles. Indeed, when cited to Edinburgh, he says he would willingly pay the debt sued for although not the legal expenses. I think the first plea-in-law bad. As to the second plea, of not being properly cited, I am of opinion that the execution bearing that the defender was duly cited, and no steps having been taken to set aside execution, it also falls to be repelled. I consider the whole proceedings in this case idle.

LORD YOUNG concurred

LORD RUTHERFURD CLARK—I am of the same opinion, but I would like to state further that I see no objection to the citation in this case.

LORD TRAYNER—I agree upon all the grounds stated.

The Court adhered.

Counsel for Complainer and Reclaimer—Jameson — M'Lennan. Agent — Andrew Tosh, S.S.C.

Counsel for Respondent—Shaw—A. S. D. Thomson. Agent — Marcus J. Brown, S.S.C.

Saturday, February 28.

SECOND DIVISION.

THE DUKE OF BUCCLEUCH AND QUEENSBERRY *v.* SIR FREDERIC JOHNSTONE.

Superior and Vassal—Casualty—Composition—Entry of Trustees—New Investiture.

In 1810 a singular successor vested in lands, but unentered with the superior, by trust-disposition and settlement disponed the lands to trustees, directing them to pay his debts, and annuities to himself and his wife, and to carry out the provisions of his deeds of settlement in favour of his wife, children, or any other person or persons. The trustees were empowered to sell his lands, with his written consent, for payment of debts, and were bound to reconvey the remainder when the debts were paid, or whether paid or not, at Martinmas 1814.

The trustees were infeft on this deed, and after the truster's death in 1811 they entered with the superior and paid composition, and in 1860 the last surviving trustee reconveyed the lands to the truster's heir, who was infeft on the conveyance, and by the operation of the 1874 Act entered with the superior, who demanded a casualty of composition.

The heir maintained that the disposition to the trustees and their infeftment and entry did not create a new investiture, because it was a trust for creditors, and the radical right remained in his immediate ancestor, the truster. Besides, the superior's confirmation of the trustees' title confirmed previous conveyances and infeftments, including the truster's, and therefore on both grounds he was only liable in relief-duty.

Held that the trustees' entry did create a new investiture, but even if it did not, the present owner was not the heir of an investiture recognised by the superior, for his ancestor had not been entered, and the superior's confirmation of the trustees' title was confined to what was necessary to complete the new investiture, and had no effect in confirming the truster's infeftment.

This was a special case presented by (1) the Duke of Buccleuch and Queensberry as superior of certain lands in Dumfriesshire, and (2) Sir Frederic John William John-